No. 80-1587

In the

Supreme Court of the United States

OCTOBER TERM, 1980

SAFEWAY STORES, INC.,

Petitioner,

v.

DANIEL CRESPIN,

Respondent.

BRIEF IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the burden of the Petitioner is that which is contained in the Consent Decree which it voluntarily agreed to with the Equal Employment Opportunity Commission, namely, to "make an evidentiary showing," rather than solely to explain, non-discriminatory reasons for its decision to hire someone other than the Respondent.

2. If the burden outlined in the Consent Decree is not enforceable, whether the evidentiary burden applied by the Court of Appeals is consistent with this Court's decision in *Texas Department of Community Affairs v. Burdine*, ... U.S. ..... (No. 79-1764, decided March 4, 1981) which allows the employer to explain rather than prove non-discriminatory reasons for its decision to hire someone other than the Respondent.

LIST OF PARTIES

1. The Petitioner is Safeway Stores, Incorporated, a Maryland corporation with its principal place of business in Oakland, California[1].

2. The Respondent is Daniel Crespin of Denver, Colorado.

3. In the trial court, the Equal Employment Opportunity Commission was the named plaintiff and certain labor unions were named as party defendants under Rule 19(a)(2) of the Federal Rules of Civil Procedure. However, neither the EEOC nor the labor unions participated in the proceedings below and they are not parties to this proceeding. The following is a complete list of the Rule 19(a)(2) defendants:

> Retail Clerks Union, Local No. 7
>
> Butcher Workmen of North America, AFL-CIO, Local No. 634
>
> The International Union of Operating Engineers, Local No. 1
>
> Delivery Drivers, Warehousemen and Helpers, Local Union No. 435
>
> Milk Drivers and Dairy Employees Local No. 537
>
> Warehouse and Distribution Employees Union, Local No. 452
>
> Bakery Wagon Drivers and Salesmens Local Union No. 219
>
> District Lodge No. 86, International Association of Machinists and Aerospace Workers

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[1]Safeway has no subsidiaries or affiliates.

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Daniel Crespin hereby respectfully submits his brief in opposition to the Petition of Safeway Stores, Incorporated requesting a writ of certiorari to review the decision in this action rendered by the United States Court of Appeals for the Tenth Circuit and requests that this Court deny the writ.

STATEMENT OF THE CASE

In its Petition the Petitioner, Safeway Stores, Incorporated ("Safeway"), has divided its representation of the statement of the case into two sections — "Proceedings Below" and "Statement of the Facts". The section labeled "Proceedings Below" correctly outlines the history of this case below and the Respondent Daniel Crespin ("Crespin") accepts same as outlined in the Petition. Regarding

the section labeled "Statement of the Facts" Crespin accepts same with the exceptions noted below.

At page 4 of the Petition Safeway suggests that the nature of the carpenter's duties were somehow of a highly specialized nature suggesting the need of considerable experience as a carpenter. Crespin submits that this representation by Safeway is not accurate in that the duties of the carpenter were routine in nature involving basic carpentry tasks such as building minor fixtures and doing general maintenance work. Crespin's contention is supported by the evidence in the record and the master and trial court so found in their findings of facts which remained undisturbed by the Court of Appeals on review.

At page 5 of the Petition Safeway characterizes Crespin's carpentry experience as a hobby. Crespin contends that his ultimate career goal was employment as a carpenter with Safeway and the record reflects that carpentry provided Crespin with a source of supplemental income for a number of years and that he pursued formal training in the field of carpentry in an effort to achieve this ultimate career goal.

Finally, at page 5 of the Petition Safeway indicates that Crespin has not alleged that the hiring of a second carpenter by Safeway in June of 1977 was in any way discrimination. Technically, this may be correct since no separate judicial complaint was filed raising such a claim. However, testimony and exhibits were received by the master regarding the filling of this second position at the time of the subsequent remedial hearing because of their probative value to the issues involved in the case.

REASONS FOR DENYING THE WRIT

I. SAFEWAY AGREED TO ITS BURDEN IN THE CONSENT DECREE WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND THE COURT OF APPEALS CORRECTLY INTERPRETED THE BURDEN AGREED TO IN THE CONSENT DECREE.

As indicated in Safeway's statement of the Case, Safeway entered into a Consent Decree with the Equal Employment Opportunity Commission ("EEOC") on September 29, 1976 settling the class action lawsuit brought against it by the EEOC. The Consent Decree set forth the hearing procedures and burdens of proof to be applied to any individual claims of discrimination by the members of the affected class. Paragraph XII, F., 9., of the Consent Decree provided as follows:

> It shall be the burden of the charging party to make an evidentiary showing that he or she is a member of the affected class as defined at Section I., C.4 herein, and that she or he was not hired or was otherwise adversely affected by personnel action of the company. It shall then be the burden of the company *to make an evidentiary showing* that the reason for the failure to hire or other adverse personnel action was other than the charging party's membership in the affected class. (Emphasis added).

Safeway voluntarily agreed to the standard of its burden by entering into the Consent Decree. Voluntary agreements are permissible so long as they are not violative of the purposes for which Title VII was enacted. See *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

Pursuant to the Consent Decree Safeway agreed that its burden was "to make an evidentiary showing that the

reason for the failure to hire or other adverse personnel action was other than the charging party's membership in the affected class'' in order to rebut a prima facie case of discrimination by the individual charging party. The phrase ''to make an evidentiary showing'' implies more than simply offering a legitimate explanation. The Tenth Circuit in interpreting this phrase to mean ''establishing that the failure to hire was a reason other than membership in the affected class'' was not interpreting the employer's burden as defined by this Court in *McDonnell-Douglas* and its progeny but the burden which Safeway voluntarily placed upon itself. The Tenth Circuit's interpretation of this phrase is not erroneous and to so hold would be tantamount to approving Safeway's attempt to abrogate the terms of its voluntary agreement with the EEOC.

II. THE COURT OF APPEALS HOLDING IN THIS CASE IS IN HARMONY WITH THIS COURT'S DECISION IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS v. BURDINE*, (No. 79-1764, March 4, 1981).

A. The Court of Appeals Did Not Place a Burden Upon the Employer Which Was More Onerous Than Required by *Texas Department of Community Affairs v. Burdine* (No. 79-1764, March 4, 1981).

Despite the fact, as correctly stated in Safeway's Petition, that the Tenth Circuit did not have the benefit of this Court's opinion in *Texas Department of Community Affairs v. Burdine*, ... U.S. ..... (No. 79-1764, argued December 9, 1980, decided March 4, 1981), its holding is nevertheless consistent with *Burdine*. Safeway does not contend that Crespin failed to establish a prima facie case as required by *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 1973), but instead, that the Tenth Circuit

placed a burden upon it more onerous than required by *Burdine*. As noted above, Safeway decided prior to the case at bar what its burden was to be. However, assuming arguendo that Safeway's self-imposed burden was not enforceable, the Tenth Circuit's holding is still consistent with *Burdine*.

In order to properly analyze this issue, it is necessary to look beyond the holding of the Tenth Circuit to the underlying findings made by the district court. Crespin's claim was heard by a master appointed by the district court pursuant to the provisions of the above-referenced Consent Decree entered into by Safeway and the EEOC. Subsequent to the hearing on the liability phase of Crespin's claim, the master filed a report with the district court on October 11, 1977 making various recommended findings. The district adopted, entirely, the findings recommenced by the master by Opinion and Order dated November 16, 1977.

In his report to the district court the master found, among other things, that Crespin had indicated to Safeway, on numerous occasions, his intense interest in the carpenter position for a period in excess of five years and that the James Schlosser, the management official responsible for filling the carpenter position, was aware of Crespin's desires and of the requirement of membership in the carpenter's union for appointment to the position. More importantly, the master found that Schlosser willfully and deliberately failed to advise Crespin of the union membership requirement thereby precluding him from effectively competing for the position and that Safeway offered no legitimate explanation for this conduct. These findings remained undisturbed on appeal. With these findings clearly in mind, it can now be ascertained whether or not the burden "placed" upon Safeway was the correct one.

Burdine represents the third clarification from this Court of the test first expressed in *McDonnell-Douglas*. In

McDonnell-Douglas, supra, at 802, this Court established the applicable rules as to the burden of proof in a Title VII case as follows:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications . . . .
>
> The burden then must shift to the employer to articulate some *legitimate,* non-discriminatory reason for the employee's rejection. (Emphasis added).

As noted above, Safeway does not contend that Crespin failed to establish the prima facie case as required by *McDonnell-Douglas.* As a result of proving his prima facie case, Crespin has raised an inference of discrimination because, if unexplained, his rejection was, more likely than not, based upon the consideration of impermissible factors. See *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, at 358 n. 44 (1977). Therefore, the inquiry must focus upon whether or not Safeway met Crespin's prima facie case of discrimination.

In *Furnco Construction Co. v. Waters,* 438 U.S. 567 1978) this Court reaffirmed the employer's burden under *McDonnell-Douglas* at 578:

> When the prima facie case is understood in the light of the opinion in McDonnell-Douglas, it is apparent that the burden which shifts to the

> employer is merely that of proving that he based his employment decision on a *legitimate* consideration, and not an illegitimate one such as race. (Emphasis added).

In *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1979) this Court, again, addressed the matter of the employer's burden at 25:

> While words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some *legitimate,* nondiscriminatory reason" and "prov[ing] absence of discriminatory motive." By reaffirming and emphasizing the McDonnell-Douglas analysis in Furnco Construction Co. v. Waters, supra, we made it clear that the former will suffice to meet the employee's prima facie case of discrimination. (Emphasis added).

Finally, in *Burdine,* this Court reaffirmed, for the third time, the employer's burden under *McDonnell-Douglas*:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a *legitimate,* nondiscriminatory reason. (Emphasis added).

(Slip Opinion at p. 6).

The common thread that runs through *McDonnell-Douglas* and its progeny is that the reason proferred by the employer must be a legitimate one to successfully meet the employee's prima facie case of discrimination. The le-

gitimacy of the reason articulated by the employer is a matter to be determined by the trier-of-fact. See *EEOC v. Sandia* Corporation, ... F.2d ....., 23 EPD ¶31,175 (10th Cir. 1980). Whatever the finding of the trier-of-fact may be, it should not be disturbed upon review unless it is clearly erroneous leaving the reviewing court with a definite and firm conviction that a mistake had been committed. See *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The findings of the master and the district court that Safeway failed to demonstrate the legitimacy of its articulated reason were, correctly, left undisturbed by the Tenth Circuit because they were not "clearly erroneous." Safeway failed to offer an explanation as to why it did not inform Crespin of the membership requirement despite several inquiries by him over a period of five years. Instead, Safeway offered the "explanations" that Crespin was rejected because he was not a member of the union and the selectee was more qualified. Such explanations, in the factual setting as we have here, do not rise to the level of being legitimate and the master and courts below correctly so found. This result is, without a doubt, consistent with *Burdine* and the decisions rendered by this Court prior thereto.

B. *The Court of Appeals Did Not Ignore Safeway's Explanations of the Reasons for Its Actions.*

Safeway's offered reasons for its actions were that it was bound by contractual obligations not to hire Crespin because of his lack of union membership and that it hired a more qualified applicant. Crespin will not here rehash his arguments set forth in paragraph II, A. above since the offered reasons were not legitimate. However, it should be pointed out here that the master found to a reasonable degree of certainty that had Crespin been advised of the union membership requirement he would have taken the necessary steps to become a union member and be placed on the

union's referral list. This finding was adopted by the district court and remained undisturbed on review because it was not clearly erroneous. In fact, it is interesting to note that Crespin took these very steps to make himself eligible when a second position became available in June of 1977. See Tenth Circuit opinion at 634 F.2d at 1278.

C. *The Court of Appeals Did Not Assume the Existence of Discrimination Because Safeway Entered Into the Consent Decree with the EEOC.*

Safeway suggests that somehow the Court of Appeals ignored Safeway's "explanations" because it had prejudged this matter due to the fact that Safeway entered into the Consent Decree with the EEOC. As support for this contention Safeway offers the following portion of the Tenth Circuit's opinion: "So it is not quite the situation of the ordinary lawsuit in which the parties are writing on a clean slate." 634 F.2d at 1280. This quotation is clearly taken out of context in which it was made by the Tenth Circuit. It is quite apparent, as this Court will see, that this statement was made in reference to the procedural and burden of proof considerations because of the fact that this claim was heard under the provisions of a consent decree as opposed to the more common circumstance where the claim arises out of a separate and independent lawsuit.

D. *Crespin Was Not, Under the Circumstances of this Case, Required to Offer Evidence That Safeway's Reasons Were a Mere Pretext for Discrimination.*

As indicated above Safeway failed to sustain its burden of offering a legitimate explanation for its actions. Therefore, Crespin was not required to offer anything further. This would be comparable to the example given by this Court in *Burdine* where the Court stated:

> Establishment of the prima facie case in effect creates the presumption that the employer unlaw-

> fully discriminated against the employee. If the trier-of-fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment of the plaintiff because no issue of fact remains in the case.

(Slip Opinion at pp. 5-6).

In the case at bar, Safeway's "explanations" are tantamount to silence thereby obviating Crespin's obligation to offer anything further. It is the risk of non-presuasion.

Respectfully submitted,

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April 17, 1981